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In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1969

COSTAS THEODOROPOULOS and
ELENI THEODOROPOULOS, nee MASOURAS,
Petitioners,

vs.

THOMPSON-STARRETT COMPANY, INC., a corporation, and MERRITT-CHAPMAN & SCOTT CORPORATION, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(OPINION BELOW IS APPENDED HERETO)

To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

The above named Petitioners respectfully Petition this Court to issue its Writ of Certiorari to the said Court of Appeals, to review that court's judgment affirming a final judgment of the United States District Court for the Southern District of New York which dismissed this Petitioner-Plaintiff's Civil Action for damages for a breach of contract without trial and with prejudice.

OPINION BELOW

The opinion of the court of appeals, set forth in the appendix of this Petition at Pages 1a-9a, is reported in: *Theodoropoulos* v. *Thompson-Starrett Company* (CA 2, 1969) 418 F 2d 350.

No opinion was filed by the District Court.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The jurisdiction of this court is invoked under 28 USC Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. The extent of District Courts "Inherent Power" to dismiss pending Civil Cases, beyond the limits of that power as expressed in this court's decision in *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L. Ed.2d 734.

Specifically, applying the above question: Where the Petitioner-Plaintiff's case had been dismissed without notice, and the court records affirmatively showed the lack of notice, as a result of an alleged failure to comply with an ambiguous court order, did the district court abuse its discretion in granting the Petitioner-Plaintiff's Motion to Vacate that dismissal only to the extent of permitting the Petitioners to file a Note of Issue of Readiness for Trial within 10 days, and then dismissing the Petitioner-Plaintiff's case with prejudice where the Petitioner-Plaintiffs showed that no notice of the second order was received by them either, and no proof of any notice was made.

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2. Did the Court of Appeals misconstrue the available evidence on the question of notice, as that court's decision is not substantiated by the record, and in fact is contradicted by the record?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The extent to which a Federal District Court can dismiss pending cases, pursuant to Federal Rules of Civil Procedure, §41 (b), and the extension of that rule pursuant to the decision in *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed.2d 734, is here involved.

The only constitutional provision which is involved is that part of the Fifth Amendment to the Constitution of the United States, reading:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Petitioners believe that the arbitrary extension of an inherent power by the district court in this case, as approved by the Court of Appeals, is sufficiently serious from the standpoint of orderly and responsible administration of justice in the district courts, so that it would be in the public interest for this court to treat this Petition, and any further review which it might give, on the basis of a denial of Petitioner's Constitutional Rights, rather than on a basis of mere procedural error.

STATEMENT OF THE CASE

The original action in this matter was commenced on July 23, 1965, in the Federal District Court for the Northern District of Illinois. Pursuant to a motion to transfer

filed on behalf of the defendants, the action was thereafter transferred to the Federal District Court for the Southern District of New York. On February 17, 1966, the plaintiffs executed a stipulation extending the time within which the defendants might appear and plead. Answers and appearances were filed on behalf of both defendants on March 18, 1966. Deposition notices calling for the depositions of the plaintiffs were served by each defendant. The plaintiffs were then and still are living in Greece. Subsequently, the plaintiffs traveled to New York for their depositions, which were taken on January 17, 18, 19, 20, 23, 24 and 25, 1967. Demand for production of certain documents was made by the defendants, and signature to the depositions was deferred until the existence of those materials could be affirmed or denied.

Following the completion of these depositions, the attorneys for the plaintiffs caused a notice to be served upon the defendant Thompson-Starrett Company, for the deposition of their President, which deposition was continued at the request of the defendants, by stipulation, from April 27, 1967, until May 26, 1967; from that date to June 26, 1967, and from that date until July 26, 1967, at which time the deposition was concluded. The plaintiffs requested many documents at the deposition, and production was deferred by agreement until final compliance was made by the plaintiff to the defendants' production demand. Thereafter, the deposition of the President of Merritt-Chapman & Scott was noticed, and set for November 9, 1967. This deposition was continued by stipulation from that date until November 21, 1967, and again, from November 21, 1967, until December 7, 1967, at which time the deposition was concluded. Production of materials called for at this deposition was similarly deferred.

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On June 19, 1967, the Federal District Court had conducted a pretrial in the matter. As a result of that pretrial, Judge Sidney Sugarman entered an order that within 150 days a Note of Issue for Trial should be filed and that all discovery should be completed. Among other things, the order stated that if the case was not placed on the trial calendar within the time stated, an ex parte order dismissing the action would be filed, unless, prior to the expiration of the 150 day period, an application was granted further extending the time to comply. On November 17, 1966, the parties executed a stipulation to the effect that no objection would be made to a petition requesting an extension of the 150 day order, for a further period of 90 days. The plaintiffs subsequently filed their Petition, requesting an extension of time for an additional 90 days, and the Petition was granted. Thereafter, on March 6, 1968, the plaintiff prepared a list of all documents whose production had previously been demanded, and after determining whether compliance had in fact been made by the plaintiffs, wrote to the defendants, requesting compliance on their part with the rules of discovery. The same day, on March 6, 1968, Judge Sugarman dismissed the plaintiff's action *sua sponte,* for lack of prosecution, without prejudice. The action was taken without notice of the parties, and the plaintiffs never received notice of the entry of the order.

No compliance has ever been made by the defendants, with the call for production made at the depositions and the plaintiffs' letter of March 6, 1968. Correspondence was directed to both defendants' attorneys, again on August 15, 1968, in connection with compliance. It was not until August 22, 1968, when the plaintiffs received a reply to the letter of August 15, that they learned of the

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dismissal entered on March 6, 1968. This was the first correspondence received from the defendants since the letter to the defendants dated March 6, 1968. On September 24, 1968, the plaintiffs filed their application to reinstate the cause to the court calendar, and to permit the completion of discovery already initiated. Both defendants filed affidavits in opposition. On October 10, 1968, Judge Sugarman vacated the order of March 6, 1968, to the extent of permitting the plaintiff to file a Note of Issue within 15 days. The plaintiffs did not receive notice of this order. On November 15, 1968, Judge Sugarman dismissed the plaintiff's case for lack of prosecution, *with prejudice*. On November 25, 1968, the plaintiffs filed their application to vacate the order of November 15, 1968, and to reinstate the action and permit the filing of a Note of Issue for trial. A Note of Issue was in fact filed that date. Affidavits were filed by each defendant in opposition to the application, and on December 12, 1968, the application was denied by Judge Sugarman. This order was filed on December 16, 1968.

On December 26, 1968, the plaintiffs filed a notice of motion, supported by Affidavits, requesting a rehearing of their application to vacate and reinstate. The defendants filed memorandum in opposition to the motion. The plaintiffs filed a memorandum in support of their motion. Thereafter, the defendants filed a reply memorandum, and a rebuttal memorandum, in opposition to the plaintiffs' application. On April 5, 1969, Judge Sugarman denied the plaintiffs' motion for reargument. The plaintiffs served notice of appeal from the court's orders of March 6, 1968; November 15, 1968; December 12, 1968, and April 5, 1969, on May 1, 1969. On June 9, 1969, the record on appeal was certified in the district court, and

docketed in the United States Court of Appeals for the Second Circuit.

Appellant's brief was filed with the Court of Appeals, as were answering briefs from each of the defendants. Thereafter, a reply brief was filed on behalf of the appellants. Oral argument was heard before the court on October 17, 1969, and on November 17, 1969, the Court of Appeals affirmed the dismissal order. A timely Petition for Rehearing was thereafter filed and denied.

ARGUMENT

I. DISMISSAL PURSUANT TO AN UNIDENTIFIED "INHERENT POWER" GRANTED TO A DISTRICT COURT NOT BY STATUTE BUT BY DECISIONAL LAW RAISES A SIGNIFICANT ISSUE WHICH SHOULD BE DECIDED BY THIS COURT:

TO WHAT EXTENT CAN THE INHERENT POWER TO DISMISS BE EXERCISED BY A COURT WITHOUT LIMIT OR REVIEW?

The issue raised by this case is of fundamental importance in the administration of justice, in that the extension of Federal Rule of Civil Procedure 41 (b) to include dismissals of pending cases on grounds not authorized in that rule, but pursuant to an "Inherent Power" of the court, has now been further extended to permit the dismissal of pending cases without *any* notice to the litigants or their attorneys.

It is the Petitioner's contention that this court need do no more than review its prior decision in *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 82 Sup. Ct. 1386, 8 L. Ed. 2d 734, to determine that a limit must be set with regard to the power of the court to utilize dismissal powers not granted by the Federal Rules of Civil Procedure. Unless a further definition of "inherent power" is provided by this court, and the exercise of the power confined to reasonable limits, a very real danger exists that due process of law will be denied similar parties in the future.

A reading of the *Link* case discloses that it is similar to this matter in that an appeal of a dismissal of a plaintiff's case in the District Court for want of prosecution

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was involved, but further, that the question of how much notice is necessary to a party or attorney necessary to satisfy due process of law was not there decided. As pointed out by this court, the fundamental requirement is an opportunity to be heard upon notice in such proceedings as are adequate to safeguard the rights of a party. More pertinent yet, is the court's statement that the adequacy of notice turns on the knowledge of a party of the consequences of his conduct. In *Link,* the plaintiff's attorney was found guilty of misconduct where he knew about a pretrial more than 14 days prior to the event, and voluntarily elected not to attend. The circumstances there at least showed some notice that was in fact communicated to, and received by, the parties attorney. The circumstances in the present case clearly indicate no such knowledge on the part of the plaintiffs of any forth coming hearing or court order, and a complete absence of notice to their attorneys of the need to take any further action than the motion to vacate already filed. The order of November 15, then, without notice, and without an opportunity for a hearing, that imposed an even greater penalty than the preceding order of March 6, which also had been entered without notice constituted not only an abuse of discretion on the part of the court, but the depravation of a valuable property right without due process of law.

It should first be noted that the affirmance of the dismissal for want of prosecution in *Link* was by a narrowly divided vote of this court. It is the Petitioner's belief that the present case is so easily distinguishable, on several grounds, from the factual situation in *Link,* that a different result would obtain.

In the first place, this court's majority opinion in *Link* pointed out that there the plaintiff had available the remedy provided by Federal Rule of Civil Procedure 60 (b), and failed to avail himself of the "escape hatch" provided by that rule. In the present case, the plaintiff moved specifically under Rule 60 (b) to vacate an order which unquestionably was entered without prior or subsequent notice to the plaintiffs. The original dismissal was without prejudice, and as a result of utilizing Rule 60 (b), the plaintiffs wound up having their case dismissed with prejudice, as the result of one simple fact: The failure of their attorneys to receive notice of the courts order granting the Section 60 (b) motion.

The plaintiffs, being unaware of the order, obviously could not comply with its terms, and so were denied any notice of the following order, which dismissed their case for failure to comply with the preceding order they had never heard of. The implication, then, in *Link,* that a Petitioner must first utilize another remedy may have been predicated upon an assumption that that remedy would be adequate for the purpose. The results here indicate that the "remedy" may lead to a cure worse than the original disease.

Offsetting the conclusion in *Link* that plaintiffs counsel's failure to attend the pretrial conference was either deliberate or the product of neglect, because of the absence of a Section 60 (b) motion, is the affirmative evidence in the present case that the plaintiffs attorneys had no notice of the need to comply with an order of which they were unaware. This court certainly made it clear by its prior decision that the "Inherent Power" to dismiss would be limited by the requirement that the party receive adequate notice and a hearing. In *Link,* it was conceded that

Plaintiff's Counsel received due notice of a pretrial conference, while in the present matter the plaintiff offers uncontradicted affidavits that they received no notice.

Finally, it is equally difficult to justify a result in this case under the rationale of *Link,* in that there it was concluded by this court that the counsel in question could have foreseen the consequences of his own default in attendance, whereas, here it would be difficult to contend that anyone should have foreseen that a case once dismissed without prejudice would be dismissed with prejudice as the direct result of the Petitioner's efforts to vacate what they contended to be a void order.

Mr. Justice Black well pointed out, in his dissent, that dismissal of the case under such circumstances was a drastic sanction, and further commented that nothing short of clairvoyance would have enabled either the plaintiffs or their attorney to anticipate the courts dismissal of the action. That comment is doubly appropriate in the present situation.

II. THIS COURT SHOULD CONSIDER WHETHER THE COURT OF APPEALS MISCONSTRUED THE FACTS AS STATED IN THEIR OPINION, AND THEREBY IMPROPERLY UPHELD THE EXERCISE OF AN INHERENT RIGHT OF DISMISSAL.

In support of the Petitioner's contention that no notice had been received by their attorneys in connection with the order of October 10, 1968, which gave the plaintiffs 15 days to file a Note of Issue, two Affidavits were filed. A reading of the Affidavits discloses no basis for the remarks made either in the headnote to the court of appeals opinion, or in the body of the opinion. In the headnote appears the statement that the plaintiff's attor-

neys had either lost a post card notice or, through error, did not distribute notice to particular members of the law firm who were handling the case, and in the body of the opinion, the court stated that the attorneys conceded that they apparently had lost the post card. With all due respect to the Court of Appeals, at no time was such a concession ever made. The first Affidavit was candid in its discussion of the possible reasons for failure of notice, but explicit in its statement that no form of notice had in fact been received "by the undersigned or any other attorney of this firm familiar with this action." Further, the Affidavit recited that "the defendants did not serve a notice of entry, nor was any post card received from the office of the clerk . . ." Finally, the Affidavit concluded "a search of the file reveals that there is no record of such post card having arrived." In addition, in a second Affidavit, made in connection with the Application for a Rehearing, it was specifically pointed out by the attorney handling the case ". . . I received no post card from the court advising me of the entry of that order. No notice of entry was served by the defendants. No attorney in this office received *any* indication of the entry of that crucial order from any source." In view of the plain meaning of these Affidavits, and the fact that they were nowhere contradicted by the defendants, the Appellate Court's opinion discloses a material error with regard to the question of notice. If there was no error or neglect on the part of the Petitioner's Attorneys in connection with receiving notice, then the petitioners and their attorneys obviously did not have the fair opportunity to be heard spoken of by this court in *Link*.

CONCLUSION

Wherefore, Petitioners respectfully pray that this court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgments below may be reversed, and for all other proper relief.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 130—September Term, 1969.

(Argued October 17, 1969 Decided November 17, 1969.)

Docket No. 33688

COSTAS THEODOROPOULOS and ELENI THEODOROPOULOS, nee MASOURAS,

Appellants,

—v.—

THOMPSON-STARRETT COMPANY, INC., a corporation, and MERRITT-CHAPMAN & SCOTT CORPORATION, a corporation,

Appellees.

Before:

FRIENDLY, HAYS and ANDERSON,

Circuit Judges.

Appeal by plaintiffs from orders dismissing their action with prejudice for failure to prosecute and denying a subsequent motion to vacate the order of dismissal, in the United States District Court, Southern District of New York, Sidney Sugarman, *Chief Judge.* Affirmed.

FRANCIS D. MORRISSEY, Esq., New York, N. Y. (Thomas F. Bridgman, Esq., Gregor F. Gregorich, Esq., Thomas R. Nelson, Esq., and Baker & McKenzie, New York, N. Y., on the brief), *for Appellants.*

CHARLES KORN, Esq., New York, N. Y. (Marvin S. Machson, Esq., and Samuel Statler, Esq., on the brief), *for Thompson-Starrett Company, Inc.*

RALPH L. ELLIS, Esq., New York, N. Y. (Shea, Gallop, Climenko & Gould, New York, N.Y., on the brief), *for Merritt-Chapman & Scott Corp.*

ANDERSON, *Circuit Judge:*

Costas and Eleni Theodoropoulos appeal from an order of November 15, 1968, dismissing their suit with prejudice for failure to prosecute, pursuant to F.R.C.P. 41(b), and from a subsequent order denying a motion to vacate this dismissal. We affirm.

After several years of litigating the same matter in the courts of Greece, the two plaintiff-appellants filed suit July 23, 1965, in the United States District Court for the Northern District of Illinois, seeking $4 million damages from defendant-appellees Thompson-Starrett Co., Inc. and Merritt-Chapman & Scott Corp. The action was based upon an alleged breach of two 1952 contracts pursuant to which the plaintiffs agreed to use their influence to procure certain construction work for the defendants in Greece.

The case was transferred to the Southern District of New York on January 27, 1966, upon the defendants' motion. Answers were served and depositions noticed, and the plaintiffs' depositions were ultimately taken in New York in January of 1967. The plaintiffs then sought depositions from various defendants, the taking of which was also postponed at some length at the defendants' request.

During the latter series of postponements, the action appeared on the district court's regular review calendar call of June 19, 1967, after a year and one-half on its docket. Chief Judge Sugarman conducted a pre-trial hearing and entered an order on June 20 providing that if no note of issue, showing readiness to proceed to a trial, was filed within 150 days, the action might be dismissed without further notice for want of prosecution.[1]

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[1] The review calendar call and order were pursuant to the Southern District's General Rule 23, which states:

"Causes which have been pending for more than . . . one year . . . and are not on the trial calendar may be called for review upon not less than fifteen (15)

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This order specified, however, that a *sua sponte* dismissal would not be ordered if an application was granted within the 150 days extending the allotted time to comply with the condition requiring the filing of a note of issue. By agreement of all the parties, the plaintiffs sought and obtained an extension of the order for 90 days on November 11, 1967. The plaintiffs' petition recited that discovery was incomplete and that it sought an extension of "the 150-day order entered on June 20, 1967 for an additional ninety (90) days."

The 90-day extension of the order expired February 21, 1968; but no note of issue was filed on or before that day. Since nothing had been done, Judge Sugarman recited the terms of his initial review calendar order of the previous year in a new order, dated March 6, 1968, and dismissed the action for lack of prosecution, without prejudice.

On the same day, March 6, the plaintiffs' counsel in Chicago,[2] who contend that they were still attempting to secure a deposition from a defendant before proceeding to trial, wrote to the defendants' counsel in New York City asking compliance with discovery requests for certain documents. There was no immediate answer, and the plaintiffs thereafter did not make further attempts to contact the defendants until August 15, 1968, nearly

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[1] (Continued)

days notice given by the clerk by mail addressed to the attorneys of record. Notice of the call of such causes shall be published in the New York Journal, or otherwise as the court directs. The court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require."

[2] The plaintiffs were represented by a large law firm with sizeable offices in both Chicago and New York, as well as elsewhere. Although the New York office of this firm appeared in the case for the plaintiffs, apparently *de facto* conduct of the pre-trial phases of the litigation remained entirely under the control of Chicago attorneys.

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six months after the expiration of the requested extension of the 150-day order. When one of the defendants' lawyears replied to this second set of discovery requests on August 22, his letter pointed out that the action had already been dismissed. Upon learning this, the plaintiffs' attorneys moved on September 24, 1968, to "reinstate" the cause upon the calendar pursuant to F.R.C.P. 60(b). Under the rules of the Southern District, parties whose suits are dismissed customarily are sent postcards noting the filing of an order; and the filing is also reported in the *New York Law Journal.*[3] The plaintiffs' lawyers argued that they had not received a postcard informing them of the March 6th dismissal, and there was no record that a card had been sent.

The district court granted this application for relief from the judgment in an order dated October 10, 1968, which stated:

> "The order dated March 6, 1968 is vacated. Time to comply with the order dated June 19, 1967 is extended for 15 days from this date but only to the extent of filing a note of issue. No procedures under F.R.C.P. 26-37 may hereafter be had."

Once again, the period within which to file a note of issue expired without any action by the plaintiffs' attorneys. The deadline passed October 25, 1968; and in an order dated November 15, the court noted this expiration and dismissed the case with prejudice. Defendants' counsel promptly notified plaintiffs' attorneys of this action on November 20, 1968.

For the second time, the lawyers for Theodoropoulos came forward belatedly with a claim of lack of notice. They filed an application November 25, 1968, seeking an order vacating this second dismissal because they allegedly received no postcard informing them of the 15-day condition upon which their own motion to vacate the first dismissal had been granted. This time they were unable to point to an absence of evidence that a postcard had

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[3] See note 1, *supra.*

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been sent and conceded that they apparently had lost it.[4] At this time the appellants offered to file a note of issue at once. This application was denied in an order which was dated December 12, 1968, and filed on December 16.

On December 26, plaintiffs' counsel applied for a "rehearing" of their motion to restore the case to the calendar, which was treated by the district court as a motion for reargument under the Southern District's Rule 9(m),[5] which it denied in an order dated April 5, 1969. On May 1, 1969, the plaintiffs filed a notice of appeal from the four orders of March 6, November 15, December 12 and April 5 (two dismissals, a refusal to vacate, and a refusal to grant reargument).

An appeal ordinarily does not lie from an order denying a motion for reargument, *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2 Cir.), *cert. denied* 389 U.S. 970 (1967), in the absence of new matter arising after the original presentation of the argument, see *Hines* v. *Seaboard Airline RR. Co.*, 341 F.2d 229 (2 Cir. 1965); and of course no appeal is necessary from an order which has been vacated. Thus the first and last orders cited, March 6 and April 5, are not appealable. But the plaintiffs' appeal of the November 15 dismissal was timely, and it also properly brings before us the order denying a motion to vacate it on December 16.

The timeliness of an appeal is a jurisdictional question. *Guido* v. *Ball*, 367 F.2d 882 (2 Cir. 1966). In this case the

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[4] Plaintiffs' counsel noted that a partner involved in the litigation was suffering from flu during this period and was not in his New York office when the postcard probably arrived there. They also explained that the firm's New York office underwent a change of receptionists, who were responsible for sorting mail, at about this time. Affidavit of Gregor F. Gregorich, Esquire.

[5] Southern District Rule 9(m) states:

"A notice of motion for reargument shall be served within ten (10) days after the filing of the Court's determination of the original motion . . ."

appellants' timely motion to vacate was the equivalent of a motion under F.R.C.P. 59(e) and terminated the running of the time for filing a notice of appeal from November 15 until December 16, F.R.App.P. 4(a); *Vine* v. *Beneficial Finance Co., supra* at 632; 9 Moore, Federal Practice ¶204.12[1], pp. 949-951 (2d ed. 1969). After this, the timely motion for reargument on December 26 further tolled the time to appeal from that date until its denial on April 7. Cf. *Hines* v. *Seaboard Airline RR. Co., supra,* at 232.* The May 1 appeal was then taken within

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*Professor Moore states applicable case law to hold:

> "A motion to *reconsider* an order disposing of a motion of the kind enumerated in Rule 4(a) does not again terminate the running of the time for appeal. An initial motion to reconsider the judgment is a motion under Civil Rule 59(e) and *does* terminate the running of the time for appeal. But a motion to reconsider the reconsideration does not terminate the running of the time for appeal." 9 Moore, Federal Practice ¶204.12[1], pp. 951-952 (2d ed. 1969).

We are in general agreement with the philosophy advanced for this position:

> "The clear purpose of these rules is to give all parties on opportunity to challenge the judgment at the district court level without enabling them indefinitely to extend litigation by tactical maneuvering in the district court. But if a party who has once sought reconsideration by the district court is permitted to seek reconsideration of its reconsidered view, and if each motion for reconsideration terminates the running of the time for appeal, litigation at the district court level can be stretched out endlessly." 9 Moore, *supra,* at 952 n. 7.

However, we do not believe it should be applied to a *sua sponte* dismissal for failure to prosecute such as this. In such a case, the explanation for the failure is presented to the district court and passed on for the first time in the form of some type of motion under Rule 59(e); and a subsequent motion for reargument, such as the one in the case before us, represents a party's only opportunity to call new facts or arguments to the court's attention

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the 30 days provided by F.R.App.P. 4(a). There is, therefore, no jurisdictional infirmity, which would bar our determination of the issue.

We hold that the district court did not abuse its discretion in dismissing the appellants' suit with prejudice. The dismissal was proper despite the fact that the plaintiffs claim their counsel did not receive actual notice of the relevant orders and thus were unable to file a note of issue within any specified times, and despite the absence of a showing of specific prejudice to the defendants. See *West* v. *Gilbert*, 361 F.2d 314 (2 Cir.), *cert. denied* 385 U.S. 919 (1966).

In the case of the first dismissal, appellants' counsel concededly saw the initial 150-day order and expressly asked for a 90-day extension *of this order* while they completed discovery; yet they now maintain that they did not understand the 90-day extension to continue the provision for a *sua sponte* dismissal if no note of issue was filed. This first claim of lack of notice boils down to an assertion that the plaintiffs simply failed to comprehend the terms of their own stipulation with the defendants and should, therefore, be excused for paying no attention to the status of the case until six months after the time for filing expired, making no inquiry, and not noticing an announcement which was presumably published and which did reach the attention of the opposing parties.

Appellants also contend that it was excusable for them to neglect to examine the docket of the case or otherwise take steps to discover what action the court had taken on the motion which they themselves made, seeking to vacate

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[6] (Continued)
before taking an appeal. See *Hines* v. *Seaboard Airline RR. Co.*, 341 F.2d 229, 232 (2 Cir. 1965); see also *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2 Cir.), cert. denied 389 U.S. 970 (1967); *Terrasi* v. *South Atlantic Lines, Inc.*, 226 F. 2d 823, 824 (2 Cir. 1955), cert. denied 350 U.S. 988 (1956).

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the first dismissal. The only reasons they can suggest for failing to receive actual notice of the fact that it was granted, upon the condition that a note of issue be filed promptly, was that appellants' attorneys lost the postcard notice, or, through error, did not distribute it to the particular members of the law firm who were handling the case. This mistake, combined with the failure to notice the publication in the *New York Law Journal* of the filing of the order, and the neglect in not checking the docket or making any other inquiry until after the 15-day extension had expired, led to the second dismissal. We hold that it was not an abuse of discretion for the court below to order this dismissal with prejudice. It was clearly a case of inexcusable negelect and plainly warranted the denial of the subsequent motion to vacate.

The appellants' final contention is that they were misled by the fact that the first dismissal was without prejudice and thus were surprised when the second one was ordered with prejudice. Passing over the implication that this argument may assume that a party possesses a right to act in a dilatory manner unless fair warning is given that a rule will actually be enforced, we note that the sole case on which it is based, *Peardon* v. *Chapman*, 169 F.2d 909 (3 Cir. 1948), has no application to the facts before us. In that case, which included a finding that a trial court had led a plaintiff to anticipate nothing more drastic than a dismissal without prejudice and then suddenly changed its mind, the Third Circuit stated:

> "Under all the facts, in view of the intimation of dismissal without prejudice and of *a situation thereafter arising less blameworthy than in the first instance*, the dismissal with prejudice of plaintiff-appellant's cause of action was unwarranted." 169 F.2d at 913 (emphasis added).

In the case at bar, the second lapse on the part of plaintiffs' counsel was hardly "less blameworthy" than the breach which caused the initial dismissal. Instead, it

was a second and similarly inexcusable failure to comply with an an order to move a case toward trial promptly. First the appellants' attorneys forgot or ignored the terms of their own stipulation, and then they lost track of the fact that their motion to vacate the dismissal had been granted. Whether this represented calculated dilatoriness or mere carelessness, dismissal under F.C.P.41(b) was proper. "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link* v. *Wabash RR. Co.*, 370 U.S. 626, 632 (1962).

The orders of the district court are affirmed.